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No. 94-1203

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JAMES WILLIAM RINIER AND CARMELLA FORZIATI,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent's arguments highlight why this Court should allow further review and grant the petition. Overall, New Jersey has violated the precedence of this Court, decided a question different from that of another state and ignores its very laws against the discrimination of its inhabitants based on marital status.

1. The Court Should Grant The Petition To Stop Respondent From Violating The Precedence Set By This Court In *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931).

Respondent contends that there exists a choice for New Jersey married couples to avoid the discriminatory tax on marriage in their state because they can file married filing separate for federal purposes. According to Respondent, ". . .married taxpayers may choose to file separate returns and thus avoid "attribution" of their income to the income of their spouse. Any aggregation of the two spouses' income on a federal and New Jersey gross income tax joint return is a voluntary matter." (R10)[1]

New Jersey is playing a game. There is absolutely no doubt that the only reason New Jersey forces married couples to file joint when they file their federal joint, is to prevent the loss of tax revenue. It is well understood, that a married couple would usually benefit from filing a joint federal income tax return rather than a

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[1] "R" refers to Respondent's Brief in Opposition.

married filing separate return. Thus, a married couple will file joint federal and joint for New Jersey to lesson the overall tax burden. Is this what the courts consider a choice or voluntary decision?

The excuse of administrative convenience should not be accepted. With today's computer technology and every individual who earns wages, interest, dividends, capital gains having a social security number, auditing and compliance does not require the federal return being filed in the same manner as the state return. At times even the wages for federal and state purposes on the W-2 (wage and tax statement) differ. The key to the compliance system are the federal W-2 statements, Form 1099 statements, and the K-1 statements which contain the taxpayer identification number or otherwise known as the social security number for an individual. The state of New Jersey even requires the placing of a spouse's social security number on a separately filed income tax return. Respondent has not even attempted to demonstrate why

administrative convenience is a reason for the joint filing requirement.

Realizing that the Court needs to have authority to right this wrong, Petitioners point to the valid U.S. Supreme Court decision, *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931). Respondent argues that the cases *Mapes v. United States*, 576 F.2d 896 (Ct. Clms.1978), cert. denied, 439 U.S. 1046 (1978); *Zablocki v.Redhail*, 434 U.S. 374 (1978); and *Califano v. Jobst*, 434 U.S. 47 (1977) allows the state of New Jersey to exact the additional tax on married couples so long as the statute does not "directly interfere" with the right to marry. In *Hoeper*, supra at 218, the additional tax on a married person was struck down eventhough there was not a direct interference. "There is no room for the suggestion that qua the appellant and those similarily situated the act is a reasonable regulation, rather than a tax law."

Moreover, in *Mapes*, supra at 902, the opinion in its analysis of *Hoeper*, supra, did claim that, "In most respects, the Wisconsin law is on all fours with the scheme. . .." The only difference that the Court noted was that, "The federal scheme, on the other hand, offers married couples the opportunity to file separately and each be taxed individually on his or her own income." Petitioners have a problem with this definition of opportunity or as discussed by Respondent, choice or alternative; however, it must be noted that there is a key difference between *Mapes*, supra and the method New Jersey employs.

A married couple on the federal return can simply choose to either file separate or joint. Their decision does not rest on how any other returns have been filed. This is clearly not the case in New Jersey. The filing of joint or separate for New Jersey purposes is dependent on how their federal tax return is filed. Thus, there is more of a restriction in the instant case than analyzed in *Mapes*, supra.

Suppose a married couple files their federal return prior to the preparation and filing of their New Jersey return. By New Jersey law, they must file their New Jersey return on a joint basis. But realizing that the filing of a joint New Jersey return will create a greater tax liability, the married couple decides to file separately for New Jersey purposes. Who now owes the additional tax that New Jersey by law is owed? Should the state of New Jersey seek relief from the wife or the husband? Should both be found liable for the additional tax? Who has violated the tax law? Both the husband and the wife? This would never happen under the federal scheme. Thus, *Mapes*, supra does not support the Respondent's position.

As was noted in *Hoeper*, supra at 217, "It can hardly be claimed that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax."

2. The Court Should Grant The Petition Since The Supreme Court Of The State Of Kansas Has Thus Far Ordered The Dismissal Of The Appeal By The State Of Kansas In The Case Of *Eric Peden v. State of Kansas*, 73,065 (Kansas Supreme Court).

Respondent in discussing the requirement of a conflict between the highest courts of two states in regards *to Eric Peden v. State of Kansas*, 73,065 (Kansas Supreme Court) failed to mention in their analysis the Order dated February 8, 1995 (Respondent's Brief in Opposition was dated February 14, 1995) that dismissed the appeal by the defendant, the state of Kansas. (See Appendix F in this Reply). Granted, this matter may not be over yet, but the state of Kansas is having a tough time with the appeal. Even the Kansas Senate Assessment and Taxation Committee has approved a bill at to the request of the Kansas Department of Revenue that would significantly shorten the time taxpayers can claim a refund based on constitutional claims.

Respondent is again trying to simply distinguish itself from unfavorable cases by pointing out the insignificant differences that

exist in the method of tax computation and the difference in top rates. Even in *Hoeper*, supra, the taxpayer filed separately, but was taxed greater than an unmarried individual. Should not the result of a tax scheme be the focus of whether or not a tax law is constitutional? Although the method and top rate may be different between Kansas and New Jersey, the different tax treatment of a married person versus a single person is the issue.

The ruling in *Peden*, supra is the realization that the time has come for the states to realize that the differences between an unmarried person and a married person is dwindling. Respondent has even avoided discussing the issue of the similarity of an unmarried couple and a married couple. How can any court not find it an offense that the simple act of marriage subjects an individual for higher taxes.

3. The Court Should Grant The Petition Because The New Jersey Courts Did Not Give A High Enough Review To The Discrimination In View Of New Jersey's Law Against Discrimination.

Petitioners can not understand how the state of New Jersey on one hand tells its residents that they can not discriminate on the basis of marital status, but the state of New Jersey discriminates in its tax statutes. Respondent contends that the New Jersey Law Against Discrimination ". . .targets individual acts of discrimination in certain areas such as housing and employment, the New Jersey LAD is irrelevant to this analysis." (R14)

For example, it should be noted in the New Jersey Law Against Discrimination at N.J.S.A. 10:5-12 that "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: . . .l. For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, creed, color, national

origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. . .."

Overall, the New Jersey Law Against Discrimination forbids the treatment of another person economically on the basis of such classifications as marital status. How can it be that in the state of New Jersey it is acceptable discrimination for the state to exact a greater tax from a married person over a single person just because of their marital status, but tell its inhabitants in all their business dealings that marital status can not be a factor in their dealings. In other words, how can New Jersey be allowed to discriminate against a married person, but its residents can not?

Petitioners have requested that the U.S. Supreme Court use a basis of review greater than rational basis, whether that basis is intermediate scrutiny or strict scrutiny. Petitioners believe that New Jersey's Law Against Discrimination can not be ignored since it plainly puts marital status along the same lines such as race, creed, age, and sex.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 13, 1995

APPENDIX F - IN THE SUPREME COURT OF THE STATE OF KANSAS ORDERED FEBRUARY 8, 1995

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 73,065

ERIC PEDEN,
Plaintiff/Appellee,

v.

STATE OF KANSAS, et al.,
Defendants/Appellants.

ORDER

Now on this 8th day of February, 1995, the above-captioned matter comes on before the court on plaintiff's motion to dismiss the appeal filed by defendants.

The procedural facts relevant to plaintiff's motion are the following: Summary judgment was granted in favor of the plaintiff, holding provisions of K.S.A. 79-32,110 unconstitutional. The journal entry of judgment was entered on November 4, 1994. On November 7, 1994, the defendants filed a notice of appeal.

Plaintiff timely filed three post-judgment motions pursuant to K.S.A. 60-252(b) on November 14, 1994. The district court has not ruled on the plaintiff's motions.

In *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, 836 P.2d 1142 (1992), the notice of appeal was filed after one of the defendants filed a motion to alter or amend the trial court's judgment. This court held that since the district court subsequently denied the motion to alter or amend, the appellee suffered no prejudice and the premature notice of appeal was saved by Supreme Court Rule 2.03 (1994 Kan. Ct. R. Annot. 8).

Here, since the district court has not yet ruled on the plaintiff's motions, the defendants' premature notice of appeal is not saved by Supreme Court Rule 2.03. Therefore, the plaintiff's motion to dismiss the defendants' appeal is granted.

It is so ordered.

FOR THE COURT

s/ Donald L. Allegrucci
DONALD L. ALLEGRUCCI
Justice